BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLARENCE L. APPELHANS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,032,959
YARDLEY ROOFING	)	
Uninsured Respondent	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The Kansas Workers Compensation Fund appeals the May 3, 2007 preliminary hearing Order of Administrative Law Judge Thomas Klein. Claimant was awarded benefits in the form of temporary total disability compensation and medical treatment after the Administrative Law Judge (ALJ) determined that claimant was an employee of respondent and not an independent contractor, that respondent met the payroll requirements of K.S.A. 44-505 and that respondent was incapable of paying for the benefits ordered, thereby causing the benefits to be ordered from the Kansas Workers Compensation Fund.

Claimant appeared by his attorney, John L. Carmichael of Wichita, Kansas. Respondent appeared by its attorney, Terry J. Torline of Wichita, Kansas. The Workers Compensation Fund (Fund) appeared by its attorney, Matthew J. Schaefer of Wichita, Kansas.

The Board adopts the same stipulations, and has considered the same record as the ALJ, including the transcript of the Preliminary Hearing taken April 10, 2007, with attachments; and the transcript of the Discovery Deposition taken of Jeff Yardley on April 5, 2007, with attachments.

ISSUES

1. Does respondent meet the payroll requirements of K.S.A. 44-505? Respondent and the Fund argue that respondent's total gross payroll

fails to meet the $20,000.00 minimum. Claimant argues that Claimant's Exhibits 5 and 6, attached to the April, 10, 2007 preliminary hearing transcript, verify respondent's total gross payroll for the year 2006 exceeds the statutory minimum limit.

2. Was claimant an employee of respondent or an independent contractor? Respondent and the Fund argue that claimant was hired by claimant's friend, J.W., and not by respondent. Claimant argues that J.W. was an employee of respondent and invited claimant to work for respondent on the date of accident. Respondent's owner, Jeff Yardley, then affirmed the hiring at the job site when he instructed claimant to begin working and gave claimant several jobs to do.

3. Is respondent solvent and able to pay for the workers compensation benefits awarded by the ALJ? The Fund argues respondent is an ongoing business and has the resources to pay claimant's workers compensation benefits. Claimant and respondent argue respondent has very limited income potential and no assets and is financially incapable of paying the weekly benefit or the past and future medical costs.

4. What was claimant's average weekly wage on the date of accident? Additionally, does the Board have jurisdiction to consider this issue on appeal from a preliminary hearing Order?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

On January 8, 2007, claimant began working on the roof of a house located at 11606 Lost Creek Circle in Wichita, Kansas. It is undisputed that claimant presented himself at that location, climbed on the roof of the house, began helping repair the roof on that residence and subsequently fell off the roof, suffering serious injuries. The events leading up to that labor and injury are in significant dispute. Claimant argues he was invited to work for respondent by one of respondent's employees, J.W. When claimant arrived at the residence, his employment status was affirmed by Jeff Yardley (Jeff), respondent's owner. Claimant was instructed to do certain jobs, to obtain tools from Jeff's truck and to assist in the repair of the roof. While performing the repairs on the house, claimant fell and suffered serious injuries, incurring medical bills in excess of $84,000.00.

Respondent and the Fund argue claimant was an independent contractor hired for this job, with no future employment guaranteed. However, claimant was instructed where to work and what to do by Jeff. Claimant was instructed to go to Jeff's truck and bring hammers, one of which claimant used on the roof. The material being used on the roof was furnished by Jeff, and Jeff had the power to fire claimant if his work was unsatisfactory. There were several other workers at the job, all paid by the hour by Jeff. The hourly pay rate ranged from $8.00 to $17.00 per hour. Before August 2006, Jeff paid his workers in cash, but had altered his method of paying his workers. On the date claimant worked for Jeff, he was being paid $10.00 per hour and was hired full time for this job, although it was uncertain whether claimant would continue working for Jeff, had he completed this job without injury. That decision would have been determined by Jeff depending on the quality of claimant's work.

Claimant's Exhibits 5 and 6 to the preliminary hearing are records of respondent's payments to the various workers. Claimant's Exhibit 5 includes respondent's cash book which records the hours worked by the various employees and the dates involved. The hourly rate is not contained in Claimant's Exhibit 5. There was a clear increase in the amount of work being performed and the number of people working for Jeff in May 2006. Jeff explained that a hail storm in April of 2006 substantially increased his company's workload and the hours being worked and the number of workers employed by respondent. Jeff testified as to the hourly rate paid to each worker, but his memory was not good. Claimant's Exhibit 6 included the cancelled checks from respondent's bank showing the amounts paid and the worker receiving each check. However, the checks contained in Claimant's Exhibit 6 do not begin until approximately August 10, 2006, when Jeff began paying his workers with checks. The amount paid to the workers between August 10, 2006, and December 31, 2006, totaled $14,036.00. Respondent's Exhibit 1 to the preliminary hearing is a letter from respondent's accountant stating respondent's payroll expense for 2005 is $5,281.50 and for the year 2006 is $19,696.00.[1]

Jeff testified that respondent's work contracts were down considerably in 2007, with only two contracts existing at the time of his April 2007 preliminary hearing testimony. Jeff had also reduced his work force to two people besides himself. He opined that respondent would not come close to paying $20,000.00 in wages in 2007. Respondent also owned only $2,000.00 in personal property and had no money in savings. Respondent was not able to pay claimant's weekly workers compensation benefits and had no money to pay toward claimant's extensive medical bills. Even though Jeff had an existing business with some income, he was, at times, barely able to pay his rent.

There were musings in this record that respondent was insured with a workers compensation policy with St. Paul/Travelers for the injury date in question. However,

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[1] P.H. Trans., Resp. Ex. 1.

respondent was unable to produce proof of payment of any premium for that alleged coverage.

PRINCIPLES OF LAW

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

K.S.A. 44-505(a) states in part:

> Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
>
> . . .
>
> (2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than $20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than $20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection.[5]

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[2] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2006 Supp. 44-501(a).

[5] K.S.A. 44-505.

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[7]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price;

2. The independent nature of the worker's business or distinct calling;

3. The employment of assistants and the right to supervise their activities;

4. The worker's obligation to furnish tools, supplies and materials;

5. The worker's right to control the progress of the work;

6. The length of time that the worker is employed;

7. Whether the worker is paid by time or by the job; and

8. Whether the work is part of the regular business of the employer.[8]

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] K.S.A. 44-501(g).

[8] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[9]

The primary test used by courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.[10]

> Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.[11]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[12]

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

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[9] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[10] *Id*. at 102-103.

[11] *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[12] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

4. Is there any defense that goes to the compensability of the claim?[13]

K.S.A. 44-532a states in part:

> (a) If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act . . . the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.
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> (b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. Such action shall be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into.[14]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[13] K.S.A. 44-534a(a)(2).

[14] K.S.A. 44-532a.

[15] K.S.A. 44-534a.

ANALYSIS

Claimant was an employee of respondent on the date of accident. Even though claimant was invited to the job site by a co-worker, the employment was ratified by the actions of respondent's owner, Jeff Yardley. Claimant was instructed to obtain tools from Jeff's truck and then instructed to use the tools while performing work on the roofing job. The workers were being paid by the hour, and the work was directed by Jeff and no one else. Additionally, roofing was respondent's only business. The ALJ's determination that claimant was an employee of respondent is affirmed.

Utilizing Claimant's Exhibits 5 and 6 from the preliminary hearing, the Board finds respondent had annual gross wages in excess of $20,000.00 for the year 2006. In just over 4 and a half months, from August 10 through December 31, 2006, respondent paid over $14,000.00 in wages to its employees. Additionally, in the first 7 and a half months of 2006, respondent paid over $6,000.00 in wages, with the total in excess of the $20,000.00 minimum set by K.S.A. 44-505. Respondent's letter from the accountant regarding the amount of payroll expense for 2005 and 2006 carries little weight. Further explanation regarding how those numbers were determined is required before this unsupported letter would be allowed to influence the Board's decision.

Respondent does not have the ability to pay for the workers compensation benefits both ordered and already incurred in this matter. Respondent has very few assets and no savings. Its income is insufficient to cover even the weekly benefits due claimant for temporary total disability, and is wholly inadequate to pay for the over $84,000.00 in medical expenses incurred to date. Additionally, there has been insufficient evidence that respondent contracted with St. Paul/Travelers for workers compensation coverage for the date of accident. It, therefore, is appropriate to order the benefits paid from the Fund in this instance.

Objection is raised regarding the average weekly wage determined by the ALJ. The Board does not have jurisdiction to determine that issue on appeal from a preliminary hearing appeal.

CONCLUSIONS

Claimant was an employee of respondent on the date of accident and the injuries suffered by claimant arose from that employment relationship. Respondent does not have sufficient funds to pay the benefits ordered and respondent was uninsured for workers compensation purposes on the date of accident. Therefore, the decision by the ALJ to order the benefits paid by the Fund is appropriate and is affirmed by the Board. The commissioner of insurance shall have a cause of action against respondent for the

amounts paid. The appeal by the Fund regarding claimant's average weekly wage is dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the appeal by the Kansas Workers Compensation Fund regarding claimant's average weekly wage on the date of accident should be and is hereby dismissed. In all other regards, the Order of Administrative Law Judge Thomas Klein dated May 3, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Terry J. Torline, Attorney for Respondent
Matthew J. Schaefer, Attorney for the Fund
Thomas Klein, Administrative Law Judge